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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1251

[Document Number NASA-2014-0011]

RIN: 2700-AD85

Discrimination on the Basis of Disability in Federally Assisted Programs and Activities

AGENCY: National Aeronautics and Space Administration

ACTION: Notice of proposed rulemaking.

SUMMARY: The National Aeronautics and Space Administration (NASA) is proposing to amend its rules implementing Section 504 of the Rehabilitation Act of 1973 (section 504), which prohibits discrimination on the basis of disability in programs, services, and activities by recipients of Federal financial assistance from NASA as well as those programs, services, and activities conducted by NASA. The revisions to this rule are part of NASA's retrospective plan under EO 13563 completed in August 2011.

DATES: Submit comments on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments must be identified with RIN 2700-AD85 and may be sent to NASA via the Federal E-Rulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments. Please note that NASA will post all comments on the internet with changes, including any personal information provided.

NASA's full plan can be accessed at: <http://www.nasa.gov/open/>.

FOR FURTHER INFORMATION CONTACT: Robert Cosgrove, (202) 358-0446.

SUPPLEMENTARY INFORMATION

Background

In this rulemaking, NASA is proposing to amend its section 504 regulations to incorporate changes to the definition of disability required by the Americans with Disabilities Act (ADA) Amendments Act of 2008, include an affirmative statement of the longstanding requirement for reasonable accommodations in programs, services, and activities, include a definition of direct threat and a provision describing the parameters of the existing direct threat defense to a claim of discrimination, clarify the existing obligation to provide auxiliary aids and services to qualified individuals with disabilities, update the methods of communication that recipients may use to inform program beneficiaries of their obligation to comply with section 504 to reflect changes in technology, adopt updated accessibility standards applicable to the design, construction, and alteration of buildings and facilities, establish time periods for compliance with these updated accessibility standards, provide NASA with access to recipient data and records to determine compliance with section 504, and make administrative updates to correct titles.

NASA is also proposing to amend its regulation to incorporate changes required by the Rehabilitation Act Amendments of 1992 (1992 Amendments) by revising current sections 1251.2 –Employment Practices (Federally Assisted Programs) and 1251.540 – Employment (Federally Conducted Programs) and instead referencing the EEOC’s ADA title I regulation. The proposed rule also updates outdated terminology and references that currently exist in Part 1251 and changes the word “handicapped” and similar variations of that word that appear throughout Part 1251, replacing it with “people first” language (e.g., “individuals with disabilities”) consistent with the 1992 Amendments.

Section 504

NASA implements the requirements of Section 504 of the Rehabilitation Act of 1973 (section 504), which prohibits discrimination on the basis of disability in Federally conducted and assisted programs or activities, through its regulation in Part 1251. NASA's section 504 regulation applies to recipients to whom the Agency extends Federal financial assistance, such as research, education and training grants, and cooperative agreements, as well as programs, services, and activities conducted by NASA. NASA's section 504 regulation at § 1251.103 prohibits denial of the benefits of, exclusion from participation in, or other discrimination against qualified individuals with disabilities in programs or activities because a recipient's facilities are inaccessible to or unusable by persons with disabilities. Many of the entities that receive financial assistance from NASA are also covered by Title II of the ADA (title II), which prohibits discrimination on the basis of disability by public entities (i.e., state and local governments and their agencies) or Title III of the ADA (title III), which prohibits discrimination on the basis of disability by: 1) public accommodations (i.e., private entities that own, operate, lease, or lease to places of public accommodation); 2) newly constructed and altered commercial facilities; and 3) private entities that offer certain examinations and courses related to educational and occupational certification.

Definition of Disability - ADA Amendments Act of 2008

The ADA Amendments Act of 2008 (the ADA Amendments Act) was signed into law in September 2008 and became effective on January 1, 2009. Congress enacted the ADA Amendments Act to revise the ADA definition of disability in order to ensure that this definition is broadly construed and applied without extensive analysis and to supersede Supreme Court

decisions that had too narrowly interpreted the ADA's definition of a disability. The ADA Amendments Act not only amended the definition of disability applicable to the ADA but also amended the Rehabilitation Act of 1973 to conform the section 504 definition of disability at 29 U.S.C. 705(20)(B) to the revised ADA definition. In this rulemaking, NASA is proposing to amend its section 504 regulation to implement these revised requirements. NASA intends these proposed regulatory changes to be consistent with the Department of Justice's (DOJ's) proposed changes to its title II regulation to incorporate the requirements of the ADA Amendments Act published on January 30, 2014 [79 FR 4839].

Due to the changes that the ADA Amendments Act made to the application of the definition of disability, participants in recipients' programs, services, and activities who, in the past decade, may not have been determined to have a disability under section 504 and title II may now in fact be found to have a disability under those laws. Section 504 and the ADA define disability as (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such impairment; or (3) being regarded as having such an impairment [29 U.S.C. 705(9)(B); 42 U.S.C. 12102(1)]. The ADA Amendments Act does not alter these three elements of the definition of disability in the ADA and section 504, but it significantly changes how the term "disability" is to be interpreted and adds important rules of construction to inform that interpretation. Specifically, Congress directed that the definition of disability shall be construed broadly and that the determination of whether an individual has a disability should not demand extensive analysis [42 U.S.C. 12102].

NASA's proposed revisions to the definition of disability are all based on specific provisions in the ADA Amendments Act or specific language in the legislative history. Since the

ADA Amendments Act does not change the meaning of the term “physical or mental impairment,” NASA is retaining the general regulatory definitions for this term with only minor modifications consistent with DOJ’s proposed revisions to its Title II ADA regulations. First, NASA is proposing to add examples of two new body systems—the immune system and the circulatory system—that may be affected by a physical impairment. See 14 CFR 1251.102(h)(2)(A). In addition, “dyslexia” will be added to 14 CFR 1251.102(h)(2)(A) as one example of a specific learning disability that falls within the meaning of the phrase “physical or mental impairment.”

The proposed revisions also expand the definition of “major life activities” by providing a non-exhaustive list of major life activities and specifically including the operation of major bodily functions. Prior to the ADA Amendments Act, section 504 did not define “major life activities,” leaving delineation of illustrative examples to agency regulations. The definition of “disability” in the NASA’s current section 504 regulations states that “[m]ajor life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” See 14 CFR 1251.102(h)(2)(ii). The ADA, as amended, incorporates into the statutory language a non-exhaustive list of major life activities that includes, but is not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” See 42 U.S.C. 12102(2)(A). This list reflects Congress's concern that courts were interpreting the term “major life activities” more narrowly than Congress intended. See 42 U.S.C. 12101(b)(4). In §§ 1251.102(h) and 1251.503(h), NASA proposes to revise its section 504 regulatory definitions of disability to

incorporate the statutory examples as well as to provide additional examples included in the EEOC title I final regulation—reaching, sitting, and interacting with others. See 29 CFR 1630.2(i)(1)(i).

These proposed revisions also add rules of construction that should be applied when determining whether an impairment substantially limits a major life activity. The rules of construction state the following:

- that the term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA;

- that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population;

- that the primary issue in a case brought under the ADA should be whether the covered entity has complied with its obligations and whether discrimination has occurred, not the extent to which the individual’s impairment substantially limits a major life activity;

- that in making the individualized assessment required by the ADA, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADA Amendments Act;

- that the comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence;

—that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a “disability” (mitigating measures include medications, prosthetic devices, assistive devices, or learned behavioral or adaptive neurological modifications that an individual may use to eliminate or reduce the effects of an impairment);

—that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; and

—that an impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

In keeping with the ADA Amendments Act, the proposed rule provides that if a person seeks to establish coverage under section 504 using the “regarded as” prong of the disability definition, that individual need only establish that he or she has been subjected to an act prohibited by section 504 because of an actual or perceived physical or mental impairment. An individual will not be “regarded as” a person with a disability if the impairment is both transitory (meaning that it has an actual or expected duration of six months or less) and minor. ADA Amendments Act, section 4(a) (codified as amended at 42 U.S.C. 12102).

Definition of Auxiliary Aids and Services

Although NASA’s existing section 504 Federally assisted regulation referenced the provision of auxiliary aids,¹ it did not include a definition. The proposed regulation includes a

¹ Although the current regulation references “auxiliary aids,” the term has always been understood to mean “auxiliary aids and services,” and the revised regulation references them correctly.

definition for auxiliary aids and services, which is consistent with the definition used in the ADA title II regulation at 28 CFR 35.104.

Employment

NASA proposes to revise Section 1251.2 – Employment Practices (Federally Assisted Programs) and Section 1251.540 – Employment (Federally Conducted Programs) to conform to the Rehabilitation Act Amendments of 1992 (Pub. L. 102-569, sec. 506) which amended title V to make the same employment standards set forth in title I of the ADA apply to employment discrimination apply under section 504. As such, the proposed rule deletes the existing requirements related to discriminatory employment practices and references the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and to the extent such sections relate to employment, the provisions of sections 501 through 504 and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), and the Equal Employment Opportunity Commission’s ADA title I regulation at 29 CFR §1630, as amended.

NASA is also proposing to clarify its role in the processing and coordination of complaints alleging discrimination by its recipients, Title I of the ADA (title I) prohibits discrimination against individuals with disabilities employed in a business that has fifteen or more employees. Title I is enforced by the United States Equal Employment Opportunity Commission (EEOC) and is the designated Federal agency for the processing and adjudication of all complaints filed under title I. Many of the Agency’s recipients may fall under the jurisdiction of title I and may also file a complaint alleging discrimination under section 504. NASA has authority to receive complaints of discrimination and has developed procedures to identify when NASA has jurisdiction to process such complaints or when they must be referred to the EEOC or DOJ for processing. In order to avoid duplication of investigative and enforcement efforts,

NASA will process and coordinate any complaints filed under this Part in accordance with the Equal Employment Opportunity Commission (EEOC) procedures set forth in 29 CFR part 1640 and the Department of Justice (DOJ) procedures set forth at 28 CFR part 37 (Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973).

NASA is also proposing to clarify its role in the processing and adjudication of section 504 complaints in its Federally conducted programs.

Provision of Auxiliary Aids and Services

NASA's current section 504 Federally assisted regulation at §1251.103(b)(3) provides that "[r]ecipients shall take appropriate steps to ensure that no handicapped individual is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination in any program or activity receiving Federal financial assistance because of the absence of auxiliary aids for individuals with impaired sensory, manual, or speaking skills."

This Notice of Proposed Rule Making (NPRM) proposes to clarify this existing obligation by providing affirmative language explaining this obligation. Similar language is already included in NASA's Federally conducted regulation at §1251.560. (Communications)

Notice of Recipient Obligations to Comply with Section 504

NASA's section 504 regulations at § 1251.107(a) require a recipient that employs 15 or more persons to take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with or hearing and vision disabilities, and unions or

professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs or activities. The notification shall also include an identification of the responsible employee designated to coordinate the recipient's efforts to comply with section 504 pursuant to § 1251.106(a). The regulation requires the recipient to make the initial notification required by this paragraph within 90 days of the effective date of this part. This regulation also delineates the methods of initial and continuing notification to include "the posting of notices, publication in newspapers and magazines, placement of notices in recipient's publication, and distribution of memoranda or other written communications." NASA recognizes that the methods by which a recipient communicates with interested persons has changed significantly since these regulations were promulgated and this regulation as currently written does not reflect the current and future state of information dissemination. With the advent of broad application of the Internet and the Web, as well as electronic publishing, electronic mail, text messaging, and social media platforms, NASA has determined that the regulation does not adequately include electronic methods of communication. Furthermore, NASA's grant recipients currently rely on their Web sites, e-mail, text messaging, and social media to communicate with and provide information to the beneficiaries of its programs, services, and activities. Many of the publications that were available in print such as pamphlets, brochures, maps, course catalogs, policies, and procedures are now posted on the recipients' Web sites and can be printed or downloaded by the interested person viewing the Web site. In revising the regulation to include electronic communications, NASA is also providing its grant recipients the ability to provide this information in a more cost-

effective and expeditious manner than by relying on printed media. Information or programs provided to the public on recipient's Web sites should be provided in an accessible format in order to ensure equal access to the recipient's programs, services, and activities.

Accessibility Standards for New Construction

NASA's section 504 regulations at § 1251.302(c) require that if construction of a recipient's facility commenced after the effective date of the regulations (January 18, 1991), the facility must be designed and constructed so that it is readily accessible to and usable by persons with disabilities. These regulations also require that facility alterations commenced after January 18, 1991, that affect or may affect the facility's usability must be accomplished so that, to the maximum extent feasible, the altered portion of the facility is readily accessible and usable by persons with disabilities.

For facilities subject to the new construction and alterations requirements, the NASA regulation at § 1251.302 (c) has always incorporated by reference an accessibility design standard, such that construction or alterations in conformance with that standard would be deemed in compliance with NASA's section 504 regulation. Under the current regulation, new construction or alterations made in conformance with the Uniform Federal Accessibility Standards (UFAS) are deemed to be in compliance with NASA's section 504 regulation, although a recipient may depart from UFAS when other methods provide equivalent or greater access to and usability of the facility.

The adoption of UFAS as an accessibility design standard in NASA's section 504 regulation occurred in 1991 as part of a joint rulemaking with other Federal agencies, led by the DOJ pursuant to its coordinating authority for section 504 under Executive Order 12250. [51 FR 26862 July 28, 1986, as amended and 55 FR 52138, 52140, December 19, 1990]. NASA and the

other participating agencies adopted UFAS (effective January 18, 1991) to diminish the possibility that some recipients of Federal financial assistance would face conflicting enforcement standards either between section 504 and the Architectural Barriers Act of 1968, or among the section 504 regulations of different Federal agencies. [55 FR 52136-37 (1990)]

Accessibility Standards in the ADA Regulations Issued by DOJ

DOJ's 1991 title II ADA regulation incorporated by reference two sets of standards for new construction and alterations: UFAS and the 1991 ADA Standards for Accessible Design (1991 Standards) except that the elevator exemption contained at sections 4.1.3(5) and 4.1.6(1)(k) of the 1991 Standards did not apply. The 1991 title II ADA regulations also permitted departures from the particular requirements of either standard by the use of other methods when it was clearly evident that equivalent access to the facility or part of the facility is thereby provided. UFAS was included as an option for title II entities because it was deemed the accessibility standard under existing section 504 accessibility regulations. UFAS was not an accessibility option under the ADA for title III entities, even if they were also subject to an agency section 504 regulation.

On September 15, 2010, DOJ published revised title II and title III ADA regulations that included the adoption of revised accessibility standards, the 2010 ADA Standards for Accessible Design (2010 Standards). [75 FR 56164]. The 2010 Standards were based on the 2004 ADA Accessibility Guidelines adopted by the United States Access Board in 2004. (36 CFR parts 1190 and 1191). The 2010 Standards, which now supersede the 1991 Standards, were adopted by DOJ through formal rulemaking and were subject to substantial scrutiny and deliberation, including consideration of costs and benefits. Compliance with the 2010 Standards was required for all new construction and alterations that commenced on or after March 15, 2012.

[75 FR 56164, 56182 (Sept. 15, 2010)]. As of March 15, 2012, UFAS was no longer an option for compliance with title II.

NASA's Revisions to its Section 504 Federally Assisted Regulations to Adopt the 2010 Standards

In the preamble to the final title II regulation, DOJ stated that Federal agencies that extend Federal financial assistance should revise their section 504 regulations to adopt the 2010 Standards as section 504 standards for new construction and alterations [75 FR 56164, 56213 Sep. 15, 2010]. DOJ also stated its intent to work with Federal agencies “to revise their section 504 regulations in the near future to adopt the 2010 Standards as the appropriate accessibility standard for their recipients.” In coordination with DOJ, we are adopting the 2010 Standards as set forth in 28 CFR part 35, in lieu of UFAS, for new construction and alterations commencing on or after one year from the publication date of the final rule in the Federal Register. Therefore, as discussed below, the proposed rule specifies that all buildings and facilities newly constructed or altered by recipients shall comply with the requirements for a “public building or facility” as set forth in the 2010 Standards.

Under NASA's section 504 regulations, the same accessibility standards for new construction and alterations are applied to all recipients regardless of whether they are public or private entities that have an obligation to comply with title II or title III of the ADA, respectively. That is, both private and public recipients are subject to the same requirements for the purposes of compliance with NASA's section 504 regulations. The 2010 Standards impose several different requirements for buildings and facilities covered by title II as compared to buildings and facilities covered by title III. For example, Exception 1 of section 206.2.3 of the 2010 Standards exempts certain multistory buildings owned by private entities from the

requirement to provide an elevator. This exemption does not apply to buildings owned by public entities. Similarly, the 2010 Standards specify TTY requirements for public buildings that are different than those required for private buildings. In order to maintain consistency in the requirements applicable to all its recipients, regardless of whether they are public or private entities, NASA is requiring all buildings and facilities covered by its section 504 Federally assisted rule to comply with the requirements for a “public building or facility,” which are the requirements for buildings subject to title II of the ADA.

The NPRM proposes that compliance with the 2010 Standards is required one year from the publication date of the final rule in the Federal Register. In the period between the effective date of the final rule and the compliance date for new construction and alterations announced in the final rule, the NPRM proposes that recipients shall be permitted to choose to use the 2010 Standards in lieu of UFAS.² However, regardless of which accessibility standard recipients choose to use during this time period, recipients may not designate one accessibility standard for part of a facility and the other accessibility standard for the remainder.

The NPRM also proposes to adopt the approach used in both title II at 28 CFR 35.151(c) and title III at 28 CFR 36.406(a) to determine the “triggering event” for applying the proposed standards to new construction and alterations under section 504. For NASA recipients that are public entities (i.e., state and local governments and their agencies and organizations) who would otherwise comply with title II, the triggering event will be the

² This choice is in keeping with the Department of Justice March 2011 memorandum advising Federal agencies that until such time as they update their agency’s regulation implementing the Federally assisted provisions of section 504 of the Rehabilitation Act of 1973 (section 504), they may notify covered entities that they may use the 2010 ADA Standards for Accessible Design (2010 Standards) as an acceptable alternative to the Uniform Federal Accessibility Standards (UFAS). (www.ada.gov/504_memo_standards.htm).

commence of physical construction or alterations. For private entities who would otherwise comply with title III (i.e., privately owned and operated organizations), the triggering event is the date of: a) the last application for a building permit or permit extension certified to be complete by a state, county, or local government; or b) in those jurisdictions where the government does not certify completion of applications, the date when the last application for a building permit or permit extension is received by the State, county, or local government; or c) if no permit is required, the start of physical construction or alterations. For both public and private entities, NASA proposes to adopt the language found at 28 CFR 35.151(c)(4) in title II and 28 CFR 36.406(a)(4) in title III to make it clear that the date of ceremonial groundbreaking or the date a structure is razed to make it possible for construction of a facility to take place does not qualify as the commencement of physical construction.

Reasonable Accommodation (non-employment)

In Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361 (1979), the Supreme Court held that a person is not protected by section 504 if, in order for the person to meet reasonable eligibility standards, the person needs program or policy modifications that would fundamentally alter the nature of the provider's program or impose undue financial and administrative burdens (applicant who was denied admission to college nursing program because of her hearing disability asked college to provide hearing supervisor to aid her in communicating with patients, to dispense with certain required courses, and to train her to hold some, but not all, positions available to a registered nurse). Although the Court also opined in Davis that there may be situations where a refusal to modify an existing program might be discriminatory, this issue was posed to, and analyzed by, the Court in terms of the proper interpretation of the

statutory term "otherwise qualified." As a result, agency Section 504 regulations³ originally promulgated after the Davis decision addressed the obligation to provide reasonable accommodations/modifications in the definition section for "qualified handicapped person" (rather than in the nondiscrimination section).⁴

Subsequently, in Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712 (1985) (Medicaid recipients not entitled to relief under section 504 against state's reduction in the number of inpatient hospital days that state Medicaid would pay), the Court clarified its Davis analysis. In that case, the Court described Davis as striking a balance between the need to provide qualified individuals with disabilities with meaningful access to the benefit the grantee offers and the legitimate interests of Federal grantees in preserving the integrity of their programs (469 U.S. at 300-301). It further stated that, although its opinion in Davis "addressed that portion of section 504 that requires that a handicapped individual be 'otherwise qualified' before the nondiscrimination principle of section 504 becomes relevant, . . . the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications [accommodations] in its programs for the needs of the handicapped." (469 U.S. at 300, note 19).

³ See, e.g., 14 CFR 1251.503 (NASA's section 504 Federally conducted regulation.)

⁴ With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, the regulatory definition of a "qualified handicapped person" (revised to "qualified individual with a disability" in this part) is an individual who meets the essential eligibility requirements of the program and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature.

In addition, in keeping with these decisions of the Supreme Court over the past decades, Federal courts and Federal agencies have regularly acknowledged the affirmative obligation to provide qualified individuals with disabilities reasonable accommodations in programs, services, and activities.

Similarly, Congress, in the ADA at 42 U.S.C. 12182(b)(2)(A)(ii), and DOJ, in its ADA regulations at 28 CFR 35.130(b)(7) and 28 CFR 36.302, stated the obligation as a positive requirement to make reasonable changes in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability. Accordingly, and with the approval of the DOJ pursuant to its section 504 coordination authority, we are proposing to add to the section 504 rule at §§ 1251.111 (Federally Assisted Programs) and 1251.581 (Federally Conducted Programs) a provision stating that a recipient must provide reasonable accommodations by making changes to policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless the covered entity can show that the accommodations would result in a fundamental alteration in the nature of its service, program, or activity or impose undue financial and administrative burdens. The term “reasonable accommodation” is intended to have the same meaning as the term reasonable modifications under title II of the ADA (and the title II implementing regulation) and not the same meaning as “reasonable accommodation” in title I of the ADA (and the title I implementing regulation) covering employment. However, unlike reasonable modifications under title II, the obligation to provide reasonable accommodations under section 504 is limited by both the fundamental alteration and the undue financial and administrative burden defenses.

Qualified Individual with a Disability

NASA is proposing to revise § 1251.102(k) Qualified Individual with a Disability in order to streamline the language and update the references to employment to cite to the EEOC title I ADA regulation.

Direct threat.

In School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 107 S.Ct. 1123 (1987) (school board dismissed teacher after a third relapse of tuberculosis within a two-year period), the Court held that (i) section 504 covers individuals with contagious diseases and (ii) the determination of whether a person with a contagious disease is otherwise qualified must be made on an individualized basis, taking into account the nature of the risk (how the disease is transmitted), duration of the risk (how long is the carrier infectious), severity of the risk (what is the potential harm to third parties), and probability the disease will be transmitted and will cause varying degrees of harm. The individualized inquiry must include appropriate findings of fact about these factors, based on reasonable medical judgments given the state of medical knowledge; based on these findings, a determination must be made as to whether the individual's disability could be reasonably accommodated.⁵ This concept was incorporated by Congress into the ADA where it was termed a "direct threat." The ADA regulations for titles II and III incorporate provisions allowing for determinations of "direct threat" in §§35.104 and 36.104 (definitions) and §§ 35.139 and 36.208. Accordingly, and with the approval of DOJ pursuant to its coordination authority under section 504, we are proposing to revise our section 504 regulation to include language addressing direct threat consistent with the language included in

⁵ While Arline speaks to "direct threat" in terms of allegations that an individual with a "contagious disease" may pose a danger to the health and safety of others, the individualized inquiry and the specific analysis required by Arline and this regulation applies to all allegations that a person with a disability poses a "direct threat" to the health or safety to others.

the ADA title II regulation. See proposed §§ 1251.110 (Federally Assisted Programs) and 1251.580 (Federally Conducted Programs).

Procedures for Compliance.

Federal agencies that have the responsibility to ensure that their recipients comply with civil rights regulations that prohibit discrimination in programs, services, and activities that receive Federal financial assistance have provisions in their regulations that provide the authority for agencies to ensure compliance and conduct enforcement activities. NASA's section 504 regulation at § 1251.400 incorporates by reference several provisions of the Title VI of the Civil Rights Act of 1964 regulation that authorize NASA to conduct compliance activities to ensure that recipients do not discriminate on the basis of disability in their programs, services, and activities. These provisions of the title VI regulation require NASA to conduct periodic compliance reviews of recipient programs; receive, investigate and resolve complaints of discrimination on the basis of disability alleged by recipient beneficiaries;⁶ conduct hearings to determine whether Federal financial assistance is to be suspended, revoked, or withheld due to a recipient's failure to comply with any provisions of section 504;⁷ and judicial review of NASA actions to enforce Section 504.⁸ However, the section 504 regulation does not incorporate by reference three additional title VI regulatory provisions that are included in other Federal agency section 504 regulations that pertain to procedures for compliance and are critical to effective enforcement of section 504. In contrast, NASA's civil rights regulations that prohibit

⁶ 14 CFR 1250.106

⁷ 14 CFR 1250.108

⁸ 14 CFR 1250.110

discrimination on the basis of sex (Title IX of the Education Amendments of 1972)⁹ and age (Age Discrimination Act of 1975),¹⁰ as well as title VI, do have these provisions.

NASA proposes to amend its section 504 regulation at § 1251.400 to incorporate by reference those title VI regulatory provisions omitted from this section 504 Federally assisted regulation that are necessary for NASA to ensure that recipients and subrecipients are complying with this part. Accordingly, NASA will incorporate by reference into § 1251.400, NASA's title VI regulation at § 1250.105 (Compliance Information), which requires NASA to seek the cooperation of recipients in obtaining compliance with this part; requires recipients and subrecipients to keep records and provide reports to NASA upon request to determine compliance with this part; requires recipients to permit NASA to have access to records and sources of information to determine compliance with this part; and requires recipients to make available information regarding provisions of this part in a manner deemed appropriate by NASA to apprise interested persons of the rights and protections afforded to them by this part. NASA will also incorporate by reference into § 1251.400, NASA's title VI regulation at § 1250.107 (Procedures for Effecting Compliance), which delineates the process by which NASA will effectuate compliance with this part through the termination, suspension, or refusal to grant or continue Federal financial assistance if a recipient's noncompliance with this part cannot be remedied through informal means. Lastly, NASA will incorporate by reference into § 1251.400, NASA's title VI regulation at § 1250.109 (decisions and notices) which delineates the process for rendering decisions and findings of the hearings conducted in accordance with § 1250.107.

⁹ 14 CFR 1253.605

¹⁰ 14 CFR subpart 1252.2

NASA's Revisions to its Section 504 Regulation for Federally Conducted Programs

In addition to its proposed revisions to its section 504 Federally assisted regulation at §1215.1, NASA is also proposing to revise its section 504 regulation that prohibits discrimination on the basis of disability in programs, services, and activities conducted by NASA at §1251.5. In 1978, Congress extended application of section 504 to programs and activities conducted by Federal Executive agencies and the United States Postal Service. Pursuant to Executive Order 12250, the Department of Justice developed a prototype regulation to implement the 1978 amendment for Federally conducted programs and activities. More than 80 Federal agencies, including NASA, have now issued final regulations based on that prototype, prohibiting discrimination based on handicap in the programs and activities they conduct. Despite the large number of regulations implementing section 504 for Federally assisted and Federally conducted programs and activities, there is very little variation in their substantive requirements, or even in their language. The regulatory revisions in this rulemaking do not propose different requirements for NASA's Federally conducted programs, with the exception of the applicable accessibility standards for new and altered facilities.¹¹

Specifically, NASA proposes to revise the definition of “disability” and “individual with a disability” at §1251.503 by incorporating by reference the companion definitions in the revised Federally assisted programs regulation at §1251.102(h) and (k). NASA also proposes to revise the definition of “direct threat” and revise the regulatory standards for direct threat, employment,

¹¹ Facilities designed, built, or altered with Federal dollars or leased by Federal agencies are subject to the Architectural Barriers Act (ABA). The General Services Administration (GSA) is responsible for prescribing the accessibility standards for all of these facilities (other than residential structures and Department of Defense and U.S. Postal Service facilities). Thus, this rule will reference the updated ABA Accessibility Standards adopted by GSA in 2007. See 41 CFR part 102-76 Subpart C.

and reasonable accommodation in the Federally conducted programs regulation to conform with the companion regulatory standards for direct threat found at §1251.110, employment found at §1251.2, and reasonable accommodation found at §1251.111. Lastly, NASA proposes to revise its Federally conducted programs regulation at §1251.551 to update the regulatory reference to the GSA standards applicable to Federal buildings subject to the Architectural Barriers Act for new construction and alterations, which is no longer at GSA Federal Management Regulation 41 CFR 101-19.600 to 101-19.607, but is now found at 41 CFR part 102-76, subpart C.

Statutory Authority:

The National Aeronautics and Space Act (the Space Act), 51 U.S.C. 20113 (a), authorizes the Administrator of the National Aeronautics and Space Administration (NASA) to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of its operations and the exercise of the powers vested in it by law.

Regulatory Analysis

Executive Order 12866 and Executive Order 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This proposed rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this rule has been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act Statement

This rule does not contain an information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (as amended), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 14 CFR Part 1251

Administrative practice and procedure, civil rights, equal employment opportunity, Federal buildings and facilities, and individuals with disabilities.

For the reasons stated in the preamble, the National Aeronautics and Space Administration proposes to amend 14 CFR part 1251 as follows:

PART 1251 - NONDISCRIMINATION ON BASIS OF DISABILITY

1. The authority citation for part 1251 is revised to read as follows:

Authority: Sec. 504 (29 U.S.C. 794)

2. Revise the heading of part 1251 to read as set forth above.

3. Remove the following words wherever they appear in part 1251 and add in their place as indicated in the table below.

Remove	Add in its place
handicap	disability
handicaps	disabilities
handicapped person	individual with a disability
handicapped persons	individuals with a disability
handicapped individual	individual with a disability
handicapped individuals	individuals with a disability
individuals with handicaps	individuals with a disability
qualified handicapped individual	qualified individual with a disability
qualified handicapped individuals	qualified individuals with a disability
qualified individuals with handicaps	qualified individuals with a disability
qualified handicapped applicants or employees	qualified applicants or employees with a disability
nonhandicapped persons	persons who do not have a disability

Subpart 1251.1—General Provision

4. Revise §1251.100 to read as follows:

§ 1251.100 Purpose and broad coverage.

- (a) General. This part effectuates Section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.
- (b) Broad coverage. Consistent with the Americans with Disabilities Amendments Act of 2008 (ADAA) and its purpose of reinstating a broad scope of protection under the Americans with Disabilities Act and this part, the definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this part, to the maximum extent permitted by the terms of this part.

5. Amend § 1251.102 as follows:

- a. In paragraph (c), remove the word “Assistant” and add in its place the word “Associate” wherever it occurs and add the words “Diversity and” after the word “for”;
- b. In paragraph (d), remove the word “entry” and add in its place the word “entity”;
- c. Revise paragraphs (h)(1)(iii) and (h)(2)(i) through (iv);
- d. Add paragraphs (h)(2)(v) and (vi);
- e. Revise paragraphs (i) and (j); and
- f. Add paragraphs (l) through (m).

The revisions and additions read as follows:

§ 1251.102 Definitions.

* * * * *

(h) * * *

(1) * * *

(iii) Being regarded as having such an impairment as described in paragraph (h)(1)(v)(A) of this section. This means that the individual has been subjected to an action prohibited by this part because of an actual or perceived impairment that is not both “transitory and minor.”

(A) Rules of construction (1) An individual may establish coverage under any one or more of the three prongs of the definition of disability in this paragraph (h)(1), the “actual disability” prong in paragraph (h)(1)(i) of this section, the “record of” prong in paragraph (h)(1)(ii) of this section, or the “regarded as” prong in paragraph (h)(1)(iii) of this section.

(2) Where an individual is not challenging a recipient’s failure to provide reasonable accommodations under § 1251.111, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the “actual disability” or “record of” prong regardless of whether the individual is challenging a public entity's failure to provide reasonable accommodations.

(B) [Reserved]

(2) * * *

(i) Physical or mental impairment means:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic and lymphatic, skin, and endocrine; or

(B) Any mental or psychological disorder such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The phrase “physical or mental impairment” includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, specific learning disabilities (including but not limited to dyslexia), HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(C) The phrase “physical or mental impairment” does not include homosexuality or bisexuality.

(ii) Major life activities include, but are not limited to:

(A) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(B) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(C) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

(iii) Substantially limits—(A) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(1) The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA Amendments Act of 2008.

“Substantially limits” is not meant to be a demanding standard.

(2) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.

(3) The primary object of attention in cases brought under section 504 should be whether recipients have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(4) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.

(5) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph is intended, however, to prohibit or limit the use of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(6) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the

ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive errors.

(7) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(8) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(9) The six-month “transitory” part of the “transitory and minor” exception in paragraph (h)(3) of this section does not apply to the “actual disability” or “record of” prongs of the definition of disability. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(B) Predictable assessments. (1) The principles set forth in § 1251.102(h)(2)(iii) are intended to provide for more generous coverage and application of section 504's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under section 504.

(2) Applying the principles set forth in § 1251.102(h)(2)(iii) the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under § 1251.102(h)(1)(i) (the “actual disability” prong) or § 1251.102(h)(1)(ii) (the “record of” prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation of a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(3) For example, applying the principles set forth in § 1251.102(h)(2)(iii) it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated:

- (i) Deafness substantially limits hearing and auditory function;
- (ii) Blindness substantially limits visual function;
- (iii) An intellectual disability substantially limits reading, learning, and problem solving;
- (iv) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;
- (v) Autism substantially limits learning, social interaction, and communication;
- (vi) Cancer substantially limits normal cell growth;
- (vii) Cerebral palsy substantially limits brain function;
- (viii) Diabetes substantially limits endocrine function;
- (ix) Epilepsy, muscular dystrophy, and multiple sclerosis substantially limit neurological function;
- (x) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and
- (xi) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this paragraph may substantially limit additional major life activities not explicitly listed above.

(C) Condition, manner or duration. (1) At all times taking into account the principles in § 1251.102(h)(2)(iii), in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity;

the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(2) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially impairs a major life activity.

(3) In determining whether an individual has a disability under the “actual disability” or “record of” prongs of the definition of disability, the focus is on how a major life activity is substantially limited, not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

(D) Mitigating measures include, but are not limited to:

(1) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and

cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies.

(2) Use of assistive technology;

(3) Reasonable accommodations or auxiliary aids or services as defined in this section;

(4) Learned behavioral or adaptive neurological modifications; or

(5) Psychotherapy, behavioral therapy, or physical therapy.

(iv) Has a record of such an impairment means:

(A) Broad construction. Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by section 504 and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in § 1251.102(h)(2)(iii) apply.

(B) Reasonable accommodation. An individual with a record of a substantially limiting impairment may be entitled to a reasonable accommodation if needed and related to the past disability.

(v) Regarded as having such an impairment means:

(A) An individual is “regarded as having such an impairment” if the individual is subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major

life activity, except for an impairment that is both transitory and minor. A transitory impairment is an impairment with an actual or expected duration of six months or less.

(B) An individual is “regarded as having such an impairment” any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(C) Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability. Liability is established under section 504 only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 504.

(vi) Exclusions. The term “disability” does not include:

(A) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(B) Compulsive gambling, kleptomania, or pyromania; or

(C) Psychoactive substance use disorders resulting from current illegal use of drugs.

* * * * *

(i) Qualified individual with a disability means:

(1) With respect to any aid, benefit, or service, provided under a program or activity subject to this part, an individual with a disability who, with or without reasonable accommodations in rules policies, or procedures, the removal of architectural, communication, or transportation

barriers, or the provision auxiliary aids or services, meets the essential eligibility requirements for participation in, or receipt from, that aid, benefit, or service, and

(2) With respect to employment, the definition given that term in the Equal Employment Opportunity Commission's regulation at 29 CFR part 1630, implementing Title I of the Americans with Disabilities Act of 1990, which regulation is made applicable to this part by § 1251.2.

(j) Disability means a physical or mental impairment which substantially limits one or more major life activities as defined in paragraph (h) of this section.

* * * * *

(l) Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a change to policies, practices or procedures, or by the provision of auxiliary aids or services as provided in §1251.110 of this part.

(m) Auxiliary aids and services means services or devices that enable persons with sensory, manual, or speech disabilities to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the recipient. Auxiliary aids and services include:

(1) Qualified interpreters onsite or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including realtime captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and

information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

§ 1251.104 [Amended]

6. In § 1251.104, in paragraphs (a) and (c)(3), remove the word “Assistant” and add in its place the word “Associate”.

§ 1251.105 [Amended]

7. In paragraphs (a)(1) through (3) and (c)(2) introductory text, remove the word “Assistant” wherever it appears and add in its place the word “Associate”.

8. Amend § 1251.107 by revising paragraph (a) to read as follows:

§ 1251.107 Notice.

(a) A recipient that employs 15 or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with vision or hearing disabilities, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of disability in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its

programs or activities. The notification shall also include an identification of the responsible employee designated pursuant to § 1251.106(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, transmission via electronic mail or text message, publication on the recipient's internet Web site, or in newspapers and magazines, placement of notices in recipient's publication, and distribution of memoranda or other written communications.

* * * * *

§ 1251.108 [Amended]

9. Amend § 1251.108 by removing the word "Assistant" wherever it appears and adding in its place the word "Associate".

10. Add § 1251.110 to subpart 1251.1 to read as follows:

1251.110 Direct threat.

(a) This part does not require a recipient to permit an individual to participate in or benefit from the services, programs, or activities of that recipient when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a recipient must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable accommodations in policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

11. Add § 1251.111 to subpart 1251.1 to read as follows:

§ 1251.111 Reasonable accommodation.

A recipient shall make reasonable accommodations in policies, practices, or procedures when such accommodations are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the accommodations would fundamentally alter the nature of the service, program, or activity or result in an undue financial and administrative burden. For the purposes of this section, the term reasonable accommodation shall be interpreted in a manner consistent with the term "reasonable modifications" as set forth in the Americans with Disabilities Act Title II regulation at 28 CFR 35.130(b)(7), and not as it is defined or interpreted for the purposes of employment discrimination under Title I of the ADA (42 U.S.C. 12111-12112) and its implementing regulation at 29 CFR Part 1630.

12. Add § 1251.112 to subpart 1251.1 to read as follows:

1251.112 Communications.

(a) A recipient shall take appropriate steps to ensure effective communication with applicants, participants, and members of the public.

(1) The recipient shall furnish appropriate auxiliary aids or services where necessary to afford an individual with a disability, including applicants, participants and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a program or activity of the recipient.

(i) In determining what type of auxiliary aid or service is necessary, the recipient shall give primary consideration to the requests of the individual with a disability.

(ii) The recipient need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the recipient communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TTY's) or equally effective telecommunication systems shall be used to communicate with persons with hearing disabilities.

(b) The recipient shall ensure that interested persons, including persons with vision or hearing disabilities, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) This section does not require the recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where the recipient believes that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the recipient has the burden of proving that compliance with § 1251.112 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the recipient agency head or his or her designee after considering all of the recipient's resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the program or activity.

13. Revise §1251.200 to read as follows:

§ 1251.200 Discrimination prohibited.

(a) General. No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any program or activity to which this part applies.

(b) Employment discrimination standards. The standards used to determine whether paragraph (a) of this section has been violated shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and, as such sections relate to employment, the provisions of sections 501 through 504 and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as amended by the ADA Amendments Act of 2008 (Pub. L. 110-325), as such standards are implemented in the Equal Employment Opportunity Commission's regulation at 29 CFR part 1630, as amended. The procedures to be used to determine whether paragraph (a) of this section has been violated shall be the procedures set forth in § 1251.400 of this part.

§ 1251.202 [Amended]

14. Amend § 1251.202 by removing the word “Assistant” in paragraph (a)(2) and adding in its place the word “Associate”.

15. Amend § 1251.302 as follows:

- a. Revise paragraphs (a) and (c)(1); and
- b. Redesignate paragraphs (c)(2) and (3) as paragraphs (c)(5) and (6) and add new paragraphs (c)(2) through (4).

The revisions and additions read as follows:

§ 1251.302 New construction and alterations.

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities.

* * * * *

(c) Accessibility standards and compliance dates—(1) New Construction and alterations by recipients that are private entities. (i) New construction and alterations in which the last application for a building permit or permit extension for such construction or alterations is certified to be complete by a state, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the state, county, or local government) is prior to [DATE ONE YEAR AFTER PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], or if no permit is required, if the start of physical construction or alterations occurs prior to [insert date one year from the publication of the final rule in the Federal Register], then such new construction and alterations must comply with either the Uniform Federal Accessibility Standards (UFAS) or the ADA Standards for Accessible Design, (2010 Standards) as defined in 28 CFR 35.104. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(ii) New construction and alterations in which the last application for a building permit or permit extension for such construction or alterations is certified to be complete by a state, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the state, county, or local government) is on or after [DATE ONE YEAR AFTER

PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], or if no permit is required, if the start of physical construction or alterations occurs on or after [insert date one year from the publication of the final rule in the Federal Register], then such new construction and alterations shall comply with the 2010 Standards.

(2) New construction and alterations by recipients that are public entities. (i) If physical construction or alterations commence prior to [DATE ONE YEAR AFTER PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], then such new construction and alterations must comply with either UFAS or the 2010 Standards as defined in 28 CFR 35.104. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(ii) If physical construction or alterations commence on or after [DATE ONE YEAR AFTER PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], then such new construction and alterations shall comply with the 2010 Standards.

(3) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation will not be considered to commence or start physical construction or alterations.

(4) All newly constructed or altered buildings or facilities subject to this section shall comply with the requirements for a “public building or facility” as defined in section 106.5 of the 2010 Standards.

Table of Applicable Standards for Complying With 14 CFR 1251.302(c)

Compliance Dates for New Construction and Alterations	Applicable Standards for Complying With 14 CFR 1251.302(c)
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Prior to [DATE ONE YEAR AFTER PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].	UFAS or the requirements for a “public building or facility” as defined in section 106.5 of the 2010 Standards
On or after [DATE ONE YEAR AFTER PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].	All buildings or facilities shall comply with the requirements for a “public building or facility” as defined in section 106.5 of the 2010 Standards.

* * * * *

16. Section 1251.400 is revised to read as follows:

§ 1251.400 Procedures for compliance.

- (a) The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) are hereby adopted and apply to these section 504 regulations. These procedures are found at §§ 1250.105 through 1250.110 of this chapter.
- (b) The agency shall ensure that complaints alleging violations of section 504 with respect to employment are processed according to the procedures established by the EEOC in 29 CFR part 1640 and the United States DOJ at 28 CFR part 37.

Subpart 1251.5—Enforcement of Nondiscrimination on the Basis of Disability in Programs or Activities Conducted by the National Aeronautics and Space Administration

17. Section 1251.503 is revised to read as follows:

§1251.503 Definitions.

As used in this part, the term:

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids and services means services or devices that enable persons with sensory, manual, or speech disabilities to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. Auxiliary aids and services include:

(1) Qualified interpreters onsite or through VRI services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including realtime captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a change to policies, practices or procedures, or by the provision of auxiliary aids or services as provided in §1251.110 of this part.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Historic preservation programs means programs conducted by the agency that have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate state or local government body.

Individual with a disability means any person who meets the definition of "individual with a disability" under § 1251.102 (h) of this part.

Qualified individual with a disability means any person who meets the definition of "qualified individual with a disability" under § 1251.102 (k) of this part.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub.

L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810).

Substantial impairment means a significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

18. Revise §1251.540 to read as follows:

§ 1251.540 Employment.

(a) General. No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any program or activity to which this part applies.

(b) Employment discrimination standards. The standards used to determine whether paragraph (a) of this section has been violated shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12,111 et seq.) and, as such sections relate to employment, the provisions of sections 501 through 504 and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as amended by the ADA Amendments Act of 2008 (Pub. L. 110-325), as such standards are implemented in the Equal Employment Opportunity Commission's regulation at 29 CFR part 1630, as amended.

19. Revise § 1251.551 to read as follows:

§ 1251.551 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural

Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR part 102-76, subpart C, apply to buildings covered by this section.

20. In § 1251.570, revise paragraphs (b) and (c) to read as follows:

§ 1251.570 Compliance procedures.

* * * * *

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1614.

(c) The Associate Administrator for Diversity and Equal Opportunity shall be responsible for coordinating implementation of this section. Complaints may be sent to the Office of Diversity and Equal Opportunity, NASA Headquarters, 300 E Street, S.W., Washington, DC 20546.

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21. Add § 1251.580 to subpart 1251.5 to read as follows:

§ 1251.580 Direct threat.

(a) This part does not require the Agency to permit an individual to participate in or benefit from the services, programs, or activities of that recipient when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a recipient must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable accommodations in policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

22. Add § 1251.581 to subpart 1251.5 to read as follows:

§ 1251.581 Reasonable accommodation.

The agency shall make reasonable accommodations in policies, practices, or procedures when such accommodations are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the accommodations would fundamentally alter the nature of the service, program, or activity or result in an undue financial and administrative burden. For the purposes of this section, the term “reasonable accommodation” shall be interpreted in a manner consistent with the term "reasonable modifications" as set forth in the Americans with Disabilities Act Title II regulation at 28 CFR 35.130(b)(7), and not as it is defined or interpreted for the purposes of employment discrimination under Title I of the ADA (42 U.S.C. 12111-12112) and its implementing regulations at 29 CFR part 1630.

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